No. ~~1058~~ 146

In the Supreme Court of the United States

OCTOBER TERM, 1956

THE UNITED STATES, PETITIONER

v.

HOWARD A. MCNINCH, D/B/A THE HOME COMFORT CO., ROSALIE MCNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in the above cases on February 28, 1957.

OPINIONS BELOW

The opinion of the Court of Appeals in the cases (App. A, *infra*, pp. 19–28) is reported at 242 F. 2d 359. The opinion of the District Court for the Eastern District of South Carolina in *McNinch* (M. R. 9–13)[1] is

[1] Since each case came to the Court of Appeals from a different District Court, there is a separate record in each. For convenience, the records will be referred to as M. R. (*McNinch*); T. R. (*Toepleman*) and C. R. (*Cato*).

not reported. The opinion of the District Court for the Eastern District of North Carolina in *Tompleman* (T. R. 11–20) is reported at 141 F. Supp. 677. The opinion of the District Court for the Eastern District of Virginia in *Cato* (C. R. 1v–1x) is not reported.

JURISDICTION

The judgments of the Court of Appeals in all three cases were entered on February 28, 1957 (App. A, *infra*, pp. 29–31). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a claim against funds of Commodity Credit Corporation—a wholly-owned government corporation, operating within and as part of the Department of Agriculture, the funds of which are furnished and if necessary supplemented by Congress on an annual basis—is a "claim upon or against the Government of the United States, or any department or officer thereof" under the civil False Claims Act.

2. Whether a claim against the Federal Housing Administration—an unincorporated, quasi-independent, agency operating within the Housing and Home Finance Agency with funds appropriated by Congress—is a "claim upon or against the Government of the United States, or any department or officer thereof" under the civil False Claims Act.[2]

[2] If certiorari is granted, we wish to reserve the right to brief and argue, with respect to the *McVinch* portion of the case, the additional question whether a fraudulent claim for a government guarantee of an FHA home improvement loan constitutes a "claim against the United States", under the civil False Claims Act, prior to default on the loan and indemnification of

STATUTE INVOLVED

The civil False Claims Act (12 Stat. 696, 698, R. S. 3490, 5438, 31 U. S. C. 231) provides in relevant part:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and

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the lender by FHA. See *United States* v. *Tieger*, 234 F. 2d 589 (C. A. 3), certiorari denied, 352 U. S. 941; *United States* v. *Cochran*, 235 F. 2d 131 (C. A. 5), certiorari denied, 352 U. S. 941.

such forfeiture and damages shall be sued for in the same suit.

STATEMENT

These actions were brought by the United States under the civil False Claims Act, *supra*, pp. 3–4, seeking recovery against each of the respondents for false claims made by them in the course of obtaining government loans or loan guarantees.

1. *The facts.* The pertinent facts in each case may be summarized as follows:

Cato. Respondents, a corporation and its three principal directors, officers and shareholders, were engaged in cotton ginning and warehousing in Emporia, Virginia (C. R. 1x). In August, 1948, the Commodity Credit Corporation entered into a Lending Agency Agreement with the corporation, Cato Bros., Inc., pursuant to the Stabilization Act of 1942 (56 Stat. 767) and the Commodity Credit Corporation Charter Act (62 Stat. 1070), authorizing Cato Bros., Inc., as agent, to make nonrecourse loans to producers of eligible 1948 cotton (C. R. 1y). The agreement and the applicable Department of Agriculture regulations (1948 Cotton Loan Instructions, 13 F. R. 4338) authorized the agent to receive from cotton producers executed Cotton Producer Notes, together with warehouse receipts covering cotton pledged as security for the loans (C. R. 1e). The cotton notes were to contain a certification by the maker of the notes that he had produced the cotton on which the loan was to be made (C. R. 1e). The agreement provided that the agent would disburse the face

amount of the notes, and transmit them to Commodity; Commodity would in turn repay the agent the amounts advanced by it plus a fee of 1½ per cent (C. R. 1–1g). The agreement required the agent, in transmitting the notes, to certify that the representations by the maker were true to the best of the agent's knowledge and belief, and that the cotton listed on the note was "eligible" cotton as defined in the 1948 Cotton Loan instructions (C. R. 1h).

Between September 1, 1948, and November 30, 1948, respondents induced various bona fide cotton producers to sign 284 cotton producer note forms in blank (C. R. 1g). Respondents listed on these forms the warehouse receipt numbers of cotton which they had purchased from various sources, but which had not been produced by the makers of the note (C. R. 1y). They completed the forms by certifying that the cotton had been produced by and was then owned by the notes' makers, and also made the required certification on each note that the above statements (purportedly made by the producers) were correct to the best of their knowledge and belief, and that the cotton was "eligible" (C. R. 1i). Respondents received payment on the fraudulent notes together with the 1½ per cent fee provided as compensation for the use of the money purportedly disbursed by them to the producers. Respondents, however, made no disbursements to the producers—the producers having no interest in the pledged cotton—but rather retained Commodity's payments (C. R. 1y). On the basis of these facts, the District Court found that respondents had made false claims within the civil False Claims

Act and entered judgment for the Government in the amount of $60,000.[3]

Toepleman. Respondent Toepleman and Garland Greenway were in partnership as cotton factors and warehousemen with offices in Henderson and Louisburg, North Carolina, during the cotton marketing year from July 1, 1948 through June 30, 1949. (T. R. 14). During this period, the Government's 1948 cotton support program was in effect. See *supra*, pp. 4–5.

Although not a cotton producer, Toepleman wished to obtain the benefits of the program's low-interest rate, nonrecourse loans, under which the Government assumed the risks of market fluctuation during the loan period. To this end, Toepleman obtained the signatures in blank of 14 bona fide cotton producers on 82 Cotton Producer's notes (T. R. 15). He then purchased 325 bales of cotton, listed them on the producers' notes, representing that the cotton thus listed had been produced by the notes' makers, and tendered the notes to Commodity-approved lending agencies for a Government loan (T. R. 15).

Accepting these representations at face value, the lending agencies disbursed the proceeds of the loans to Toepleman and in turn transmitted the notes to Commodity for reimbursement plus the additional 1½% fee (see *supra*, p. 5), all of which Commodity paid (T. R. 15–16). Subsequently, respondent repaid 39 of the notes and redeemed the cotton thereunder; 43 of the notes went unpaid at maturity and

[3] Since 284 fraudulent notes had been sent to Commodity in thirty letters of transmittal, the District Court found each letter of transmittal a claim under the Act (C. R. 1y).

the cotton securing the loans was sold in January 1955 at a loss to the Government of $6,733.97 (T. R. 16). The District Court, as in the *Cato* case, found that Toepleman had made false claims under the civil False Claims Act and awarded judgment for the United States (T. R. 18–21).[4]

McNinch. The Government's complaint alleges the following: Respondents were president, secretary, and a salesman of an unincorporated home construction business located in Columbia, South Carolina, who, from November 6, 1951 to January 10, 1953, presented to a Federal Housing Administration-approved lending institution eleven fraudulent FHA loan credit applications, for the purpose of obtaining FHA-insured home improvement loans (M. R. 9). The loans were sought on behalf of persons on whose homes respondents had contracted to make improvements, and were for the purpose of financing these improvements (M. R. 4–5). Each application was also accompanied by a fictitious credit report, and both the applications and the reports misrepresented the financial eligibility of the customers for the insured loans (M. R. 5). The lending institution, relying on the false applications and credit reports, made the loans as requested, and submitted them to FHA for insurance pursuant to

[4] The District Court held that each of the 82 notes constituted a separate claim under the Act. However, since it was also of the view that the actual damages suffered by the United States were not "by reason of the doing or committing such act [the false claim]", as required by the Act, but resulted from a drop in the market price of the cotton, the court directed the entry of judgment for $164,000, on the basis of the statutory sum of $2,000 for each false claim (T. R. 20–21).

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Title I of the National Housing Act.[5] The FHA acknowledged the loans for insurance and billed the lending institution for the premiums required by the Act. (M. R. 5.)

In dismissing the Government's complaint, the District Court held that the complaint did not set out a claim within the civil False Claims Act since there had been no default on the loans and hence no demand for reimbursement made on the United States (M. R. 10–13).[6]

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[5] Under Title I of the National Housing Act (12 U. S. C. 1701, *et seq.*), the Federal Housing Administrator was empowered, upon such terms and conditions as he might prescribe, to insure qualified lending institutions against losses sustained as a result of loans made by them for the purpose of financing alterations, repairs, and improvements upon or in connection with real property. FHA enters into an insurance contract undertaking to indemnify the lenders against loss sustained by them on loans reported for insurance to FHA up to an aggregate amount equal to ten per cent of the value of such loans. A borrower, who wishes to obtain an improvement loan, applies to the lending institution on an FHA form ("FHA Title I Credit Application (Property Improvement Loan)"). Responsibility for determining that the borrower is a reasonable credit risk rests with the lending institution, which is permitted to rely on statements of fact made by the borrower.

Within 31 days after the loan is made, the lender must report the details of the loan transaction to FHA on an FHA form provided for the purpose, and must provide FHA with a statement that the above requirements have been complied with. After the loan is made and the details of the transaction have been reported to FHA, that agency computes the insurance premium which will be due and payable by the lending institution, records the transaction on its official records, and acknowledges the loan for insurance. See 24 C. F. R. (Perm. Ed.) 201.1–201.13; and *United States* v. *Emory*, 314 U. S. 423, 430, 433.

[6] Prior to the institution of this proceeding, respondents McNinch and Zeigler were convicted of making, in violation

2. *The holdings below.* The Court of Appeals disposed of the three cases in a single opinion. In *Tocpleman* and *Cato*, the court reversed the judgments of the District Courts because, the false claims having been made against Commodity Credit Corporation, the civil False Claims Act was thought to be inapplicable: "[a] government corporation, even though acting as an agency of the government is not the government, nor is it a department or officer of the government" (App. A, *infra*, p. 25). In *McNinch*, the court affirmed the District Court's judgment of dismissal on the same reasoning, despite the fact that the false claims there involved were against the Federal Housing Administration, an unincorporated agency of the Government (App. A, *infra*, p. 28). As an alternative ground for affirmance in *McNinch*, the court held that "the obtaining of the guaranty of loan was not the making of a claim within the meaning of the statute. *United States* v. *Tieger*, 3 Cir., 234 F. 2d 589, cert. den., 352 U. S. 941; *United States* v. *Cochran*, 5 Cir., 235 F. 2d 131, cert. den., 352 U. S. 941" (App. A, *infra*, p. 28).

REASONS FOR GRANTING THE WRIT

1. The holdings below in *Cato* and *Tocpleman* that the civil False Claims Act is not applicable to false

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of 18 U. S. C. 1010, false statements for the purpose of obtaining FHA-insured loans.

Also, prior to this proceeding, McNinch repurchased all of the outstanding FHA-insured loans and mortgages and assigned them to the lending institution for collection, presumably in an attempt to avoid default on the loans and subsequent civil liability under the False Claims Act.

claims against a wholly-owned Government corporation such as Commodity Credit Corporation are in square conflict with *United States* v. *Rainwater*, C. A. 8, No. 15659, decided May 3, 1957, App. B, *infra*, pp. 32–42.

In *Rainwater*, as in *Cato*, the United States had filed suits under the civil False Claims Act on the basis of allegedly false representations made to Commodity for the purpose of obtaining non-recourse loans on cotton (App. B, *infra*, pp. 32–33). There, as in *Cato*, the applications to Commodity were by an authorized lending agency which had procured the signatures of bona fide cotton producers on blank cotton forms, and then employed those forms to obtain loans on ineligible cotton produced by other growers, plus interest payments for the alleged advance of its own money. In reversing the District Court's dismissal of the complaint, the Court of Appeals for the Eighth Circuit explicitly ruled that the False Claims Act applied to false claims against Commodity (App. B, *infra*, pp. 36–42). As support for its judgment, the Eighth Circuit relied primarily on the broad language of the Act; Commodity's undoubted standing as a part of the Government of the United States and an operating agency of the Department of Agriculture; and this Court's holding in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, that the False Claims Act applies to any claim which reaches "government money," however situated. The court expressly evaluated the contrary rationale of the Fourth Circuit's opinion in the present cases and concluded that "We find ourselves in disagreement with the Fourth Circuit case

and must decline to follow it" (App. B, *infra*, p. 36).

In thus disagreeing with the holdings in *Cato* and *Toepleman*, the Eighth Circuit *a fortiori* rejected the Fourth Circuit's further ruling in *McNinch* that the civil False Claims Act is also inapplicable to the false claims against the Federal Housing Administration which is not a corporation but rather an unincorporated agency within the Federal Housing and Home Finance Agency.

2. None of the grounds on which the decision below is predicated can withstand analysis.

(*a*) As the Eighth Circuit concluded in *Rainwater*, the language of the False Claims Act, standing alone, is broad enough to include government corporations. While it is probable that the Act's drafters did not specifically contemplate claims against wholly-owned government corporations when the statute was enacted in 1863 (12 Stat. 696), since at that time such corporations were virtually unknown, the general terms "Government of the United States, or any department or officer thereof" were clearly designed as "open ended"—covering every part of the Federal Government and not limited to the then extant agencies. For, as its Senatorial sponsor broadly asserted, the object of the Act was to provide protection against those who would "cheat the United States." Cong. Globe, 37th Cong., 3rd Sess., 952; see *Marcus* v. *Hess*, *supra*, 317 U. S. 537, 544. And as the court below recognized, under the normal method of reading Federal legislation, the fact that federal corporations were almost non-existent when the Act was passed would

not mean that they are not now subject to its terms (App. A, *infra*, p. 27). See *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 385.

Furthermore, this Court's decisions of the past few decades make it clear that government corporations may, in appropriate circumstances, be regarded as a direct and integral part of the Government. For example, the Court has held that the Reconstruction Finance Corporation, a government corporation comparable to Commodity, is the "Government of the United States" for purposes of a statute allowing counterclaims in the Court of Claims (*Cherry Cotton Mills* v. *United States*, 327 U. S. 536); that a national bank may pledge its assets to secure deposits of government corporations, despite the fact that the National Banking Act permits pledges only to secure deposits of "Treasury" funds (*Inland Waterways Corp.* v. *Young*, 309 U. S. 517); and that a federal corporation is a "department of the Government" under Section 2 of the Post Roads Act, and thus entitled to lower telegraph rates (*Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415). As was stated in the *Inland Waterways* case, *supra*, at 524:

> The true nature of these modern devices [government corporations] for carrying out governmental functions is recognized in other legal relations when realities become decisive. * * * The funds of these corporations are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses.

Similarly, here, the realities are decisive. With respect to false claims, Commodity's funds were for all practical purposes those of the Government. As *Rainwater* points out, since "the ultimate sources of payment of the fraudulent claims was the federal treasury * * * there can be no distinction between a government corporation or the government itself being defrauded" (App. B, *infra*, p. 37).[7]

(*b*) Likewise without merit is another ground for the holding below: that the amendment of the criminal False Claims Act in 1918 (R. S. 5438, 40 Stat. 1015) expressly to cover any corporation in which the United States held stock reveals a congressional aim to exclude all such corporations from the civil Act (R. S. 3490), which at that time and since has contained the unamended language. See App. A, *infra*, pp. 27–28. The 1918 amendment was occasioned in part by doubts as to whether the criminal Act applied to claims against the Emergency Fleet Corporation, chartered in the District of Columbia in 1917 with a provision for private as well as government stock ownership. *United States* v. *Bowman*, 260 U. S. 94, 101–102. Before the era of wholly-owned, federally-

[7] In *Pierce* v. *United States*, 314 U. S. 306, relied on by the court below (App. A, *infra*, p. 25), this Court refused to apply a false impersonation statute to the Tennessee Valley Authority, where (1) Congress had omitted the statute in specifically enumerating in the TVA Act certain federal penal statutes applicable to TVA operations (48 Stat. 68); (2) the statute had been amended, after the indictment, to make it expressly applicable to Government corporations; and (3) the Court implied that a contrary result might obtain were it confronted with "fraud which interferes with the successful operation of the Government" (314 U. S. at 312–313).

incorporated instrumentalities, there could be legitimate doubt whether a state-incorporated hybrid entity, with partial private ownership, was the "Government of the United States" for the purposes of a statute imposing criminal penalties.[8] Since 1918, the mixed-ownership government corporation has evolved into a federally-incorporated, federally-owned, and entirely governmental entity, which is in reality a corporate shell—usually an operative part of an Executive Department—the principal purpose of which is to provide a convenient bookkeeping device or a method for waiving sovereign immunity in specific areas.

The structure of Commodity Credit Corporation points up this contrast. Under its statute (15 U. S. C. 714), Commodity is "an agency and instrumentality of the United States, within the Department of Agriculture." Its Board of Directors is subject to the supervision of the Secretary of Agriculture who serves as its chairman (15 U. S. C. 714g (a)). Its employees are departmental employees and subject to the various statutes relating to federal employees. In addition, Commodity's entire original capital of $100,000,000 was supplied by the United States. 15 U. S. C. 714e. The Secretary of the Treasury must make an annual appraisal of Commodity's net worth; if the net worth

[8] But see *United States* v. *Walter*, 263 U. S. 15 (per Holmes J.), sustaining the validity of the 1918 amendment to R. S. 5438, and at the same time holding another provision of the Criminal Code (punishing an attempt to "defraud the United States") applicable to the Fleet Corporation, since "the contemplated fraud upon the corporation if successful would have resulted directly in a pecuniary loss to the United States, and even more immediately would have impaired the efficiency of its very important instrument" (263 U. S. at 18).

is impaired, the Treasury makes it up; and if there is an excess, it is paid over to the Treasury. 15 U. S. C. 713a–1, 713a–2. Also, Commodity is authorized to borrow up to $14,500,000,000 on the credit of the United States, to carry out the programs delegated to it by the Congress. 15 U. S. C. (Supp. IV) 714b (i).

In these circumstances, there can be little doubt that, far from being a hybrid private-type corporation like that involved in the *Bowman* case, *supra*, Commodity is an integral part of the Government, created by Congress to discharge significant governmental functions. Commodity is indistinguishable from the Reconstruction Finance Corporation, involved in *Cherry Cotton Mills* v. *United States*, 327 U. S. 536, 539:

> * * * Its Directors are appointed by the President and confirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; its losses the Government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes. * * *

(*c*) Since the claims here were ultimately for government funds, the irrelevant fact that the disbursement was made through a government corporation does not affect the applicability of the civil False Claims Act. In *Marcus* v. *Hess*, 317 U. S. 537, where claims were made to local municipalities and school districts for moneys to be paid out of a joint bank account containing both federal and local funds, this

Court held the civil False Claims Act applicable (317 U. S. at 544):

> * * * These funds are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookeeping devices used for their distribution. * * * The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary.

Contrary to the opinion below, the *Hess* case is highly relevant, for, as already shown, Commodity is merely a conduit for disbursing government funds—funds which need protection from fraudulent claims fully as much as the monies of the Public Works Administration involved in *Hess*. Indeed, as indicated in the Eighth Circuit's *Rainwater* opinion, since the claims in these cases were made directly to Commodity, rather than to a state intermediary, the applicability of the Act here would seem to present an *a fortiori* case. App. B, *infra*, p. 40. See also *United States v. Walter*, 263 U. S. at 18.[9]

[9] To bolster its argument, the court below also referred to the fact that subsequent legislation providing criminal penalties for defrauding particular government corporations did not include "civil penalties or forfeitures"; and that suit under the False Claims Act is brought in the name of the United States, not the corporation (App. A, *infra*, pp. 27–28). These seem to be make-weights. Since the Act has general applicability, its scope is not to be determined by Congressional action in providing specified criminal penalties for offenses against specific federal corporations. Further, Congress has specifically provided that suits on claims of Commodity may be brought in the name of the United States, as the real party in interest. 15 U. S. C. 744b (c). Cf. *United States* v. *Allied Oil Corp.*, 341 U. S. 1.

3. The court below compounded its error by holding in *McNinch* that the civil False Claims Act also does not cover claims against the Federal Housing Administration. While the FHA is suable in its own name (12 U. S. C. 1702) and is subject to the auditing requirements of the Government Corporation Control Act (31 U. S. C. 846), it is not a corporation in structure and has no capital, but operates with funds directly appropriated by Congress, like other non-incorporated agencies. 12 U. S. C. 1702–1706c, 1712. Thus, even if it be assumed that the Act is inapplicable to claims against government corporations, there is no reason why claims against FHA should not fall within the statute. In fact, FHA funds are indistinguishable in nature and source from those of the Public Works Administration involved in *Hess*; that agency was no more or less independent or distinct from the "Government" than is FHA.

4. The issues we present are important. The effect of the combined holdings below is to exclude from the coverage of the civil False Claims Act not only false claims against the forty federal entities listed in the Government Corporation Control Act (31 U. S. C. 846), but also those against several separate government agencies irrespective of whether they are a part of one of the Executive Departments, or not. Since Congress has in recent years selected corporations or independent agencies to carry out a substantial part of the Government's activities and programs, the clear result of the rulings is to deprive the Government of its only civil protection against fraudulent claims in a wide and significant area.

To illustrate the impact of these holdings, we refer to advice which we have received that over 7,000,000 distinct claims, in an estimated amount of nearly five billion dollars, are annually filed against Commodity Credit Corporation. In addition, there are approximately 265 cases now pending in the Department of Justice or before the various District Courts in most, if not all, circuits, involving 7,900 allegedly false claims against Commodity, totaling over $4,000,000 in ascertainable damages alone. The comparable figures for the Federal Housing Administration are of roughly the same order.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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MAY 1957.

APPENDIX A

United States Court of Appeals for the Fourth Circuit

No. 7224

UNITED STATES OF AMERICA, APPELLANT

v.

HOWARD A. MCNINCH, D/B/A THE HOME COMFORT COMPANY, ROSALIE MCNINCH AND GARIS P. ZEIGLER, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT COLUMBIA

(Argued October 4, 1956. Decided February 28, 1957.)

No. 7321

FREDERICK L. TOEPLEMAN, APPELLANT AND CROSS-APPELLEE

v.

UNITED STATES OF AMERICA, APPELLEE AND CROSS-APPELLANT

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH

No. 7333

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, AND MAGGIE L. DUNN (NEE: MAGIE L. STONE), APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND

(Argued January 14, 1957. Decided February 28, 1957.)

Before PARKER, *Chief Judge;* SOPER, *Circuit Judge,* and BRYAN, *District Judge*

PARKER, *Chief Judge:*

These are appeals from judgments in actions instituted under the Federal False Claims Act, R. S. 3490, 5438, 31 U. S. C. 231. In No. 7224 the action was grounded on false representations made in obtaining the guaranty by the Federal Housing Administration of loans made to defendants by a bank. Judgment was entered for defendants and the United States has appealed. See *United States* v. *McNinch,* 138 F. Supp. 711. In the other two cases, action was grounded on false representations made to the Commodity Credit Corporation for the purpose of obtaining loans on cotton. Judgment was entered in favor of the United States for the $2,000 forfeiture provided by statute as to a number of transactions and the defendants have appealed. The cases are considered together, as the controlling question in all of them is the applicability of the False Claims Act to claims against government corporations as distinguished from claims against the government itself or "any department or officer thereof."

In No. 7224 the facts are that two of the defendants were officers and one a salesman of an unincorporated home construction business. They presented to a bank, which was an approved FHA lending institution, eleven fraudulent FHA loan applications for the purpose of obtaining FHA-insured home improvement loans in behalf of home-owner customers with whom they had contracted to carry out home improve-

ments. The bank made the loans, which were then insured by the FHA pursuant to Title I of the National Housing Act. Prior to the institution of this proceeding, two of the defendants pleaded guilty to violating 18 U. S. C. 1010, which prohibits the making of false statements for the purpose of obtaining FHA-insured loans.

In No. 7321 the facts are that defendants were engaged in the cotton business. Desiring to obtain nonrecourse loans on cotton which they purchased in the course of their business, they caused eighty-two producers' notes and loan agreements to be signed by producers of cotton and used them to obtain loans under the Cotton Loan Program from the Commodity Credit Corporation, pledging as security cotton belonging, not to the producers who signed the notes, but to the defendants. The holding of the court was that each note constituted a false claim under the statute and judgment was entered against the defendant Toepleman for the sum of $2,000 as to each note, or a total of $164,000, subject to a credit of $2,000. Defendant Toepleman paid 39 of the notes and redeemed the cotton thereunder. The remaining 43 notes were not paid on maturity and the cotton pledged to secure same was sold by the government at a loss of $6,733.97. Toepleman appealed from the judgment for $162,000 and the United States filed a cross appeal from the refusal of the judge to render judgment for double the amount of the $6,733.97 loss sustained on the sale of the cotton.

In No. 7333, the facts are that the defendants obtained loans on cotton from the Commodity Credit Corporation in 30 separate transactions embracing notes which contained the false representation that they were made by the producers of the cotton. Judgment was rendered against the defendants for $60,000,

representing a forfeiture of $2,000 as to each transaction; and from this portion of the judgment defendants have appealed. Judgment was rendered in favor of defendants for $1,150.24 on a counterclaim relating to an entirely different matter, and from this portion of the judgment no appeal was taken.

The important question presented by all of the appeals is whether the forfeiture of $2,000 imposed by the False Claims Act applies where the claims are made, not directly against the government or against "any department or officer" of the government, but against a corporation as a governmental agency. We think that, in the light of the language used in the statute, as well as in the light of legislative history, this question must be answered in the negative.

The authoritative text of the False Claims Act is to be found in Section 3490 of the Revised Statutes of 1878, which is as follows:

> SEC. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the services of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "Crimes," shall forfeit and pay to the United States the sum of Two Thousand Dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

This section has never been amended, although R. S. 5438 has been amended. Prior to the amendment of R. S. 5438, the pertinent portion of that section, incorporated by reference in R. S. 3490, was as follows:

> SEC. 5438. Every person who makes or causes to be made, or presents or causes to be pre-

> sented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, any claim *upon or against the Government of the United States, or any department or officer thereof,* knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of *such claim,* makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the *Government of the United States or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim,* * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars. [Italics' supplied.]

In 1918, section 5438, then appearing as section 35 of the Criminal Code was amended by adding to the list of those to whom it was made criminal to present a false claim "any corporation in which the United States of America is a stockholder". Like language was added to the description of the claim. 40 Stat. 1015. The purpose of the amendment was to extend the criminal provision of the section so as to protect government corporations, i. e. corporations in which the government was a stockholder and in reality the owner of the corporate business and property. See *United States* v. *Bowman*, 260 U. S. 94 and H. R. Report No. 668, 65th Cong. 2d Sess. and 56 Cong. Rec. pp. 11, 118–11, 119. The section as amended was carried forward and reenacted as section 287 of Title 18 of the United States Code, making it a crime to present a false claim against "The United States, or any

department or *agency* thereof." [Italics supplied.] This language, of course, makes the criminal statute applicable to false claims against government corporations, since "agency" is defined in 18 U. S. C. 6 as including "any corporation in which the United States has a proprietary interest."

There has been no amendment of the civil provisions contained in R. S. 3490, extending their coverage to false claims against government corporations; and it is well settled that the incorporation of the terms of a statute by reference does not incorporate subsequent amendments of that statute. See *Kendall* v. *United States,* 12 Peters 524, 625; *In re Heath,* 144 U. S. 92; *Hassett* v. *Welch,* 303 U. S. 303, 314. This has been held expressly with respect to the incorporation by R. S. 3490 of the provisions of R. S. 5438. *United States ex rel. Kessler* v. *Mercur Corporation,* 2 Cir. 83 F. 2d 178, 180, cert. den., 299 U. S. 576. In the case cited, the Court of Appeals of the Second Circuit, speaking through Judge Augustus N. Hand, said:

> While section 5438 was amended, repealed, and finally since the time when it was referred to in section 3490 superseded by a broader enactment (18 U. S. C. A. 80), it stands, so far as section 3490 is concerned, as it was written when incorporated by reference. It is quite immaterial that the superseding act alone appears in the United States Code, for the Code only embodies a prima facie statement of the statutory law. It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and "no subsequent legislation has ever been supposed to affect it." *Kendall* v. *United States,* 12 Pet. 524, 625, 9 L. Ed. 1181; *In re Heath,* 144 U. S. 92, 93, 94, 12 S. Ct. 615, 36 L. Ed. 358.

See also *United States* v. *McMurtry* (W. D. Ky.), 5 F. Supp. 515, and *Olson* v. *Mellon* (W. D. Pa.), 4 F. Supp. 947, adopted as opinion of Court of Appeals of Third Circuit 71 F. 2d 1021.

The question, then, is narrowed to this: Is a claim against a government corporation, which acts as an agency of the government, a claim against the government of the United States or a department or officer thereof as required by R. S. 5438 as a condition of liability at the time of the adoption of R. S. 3490? The answer is manifestly that it is not such a claim. A government corporation, even though acting as an agency of the government is not the government, nor is it a department or officer of the government. As said by Judge Patterson in *United States ex rel. Meyer Salzman* v. *Salant & Salant*, 41 F. Supp. 196, 197: "a corporation which is an agency of the government is not the government or a department or officer of it." See also *Pierce* v. *United States*, 314 U. S. 306 and *Lindgren* v. *United States Shipping Board Merchant Fleet Corporation*, 55 F. 2d 117, 120, cert. den., 286 U. S. 542. In the case last cited this court said:

> Plaintiff contends, however, that this suit and the former suit are virtually against the same defendant because the United States owns the stock of the Fleet Corporation and the Fleet Corporation is an agency of the United States. This position cannot be sustained. The United States is a sovereign power representing in its corporate capacity the people of the country and immune from suit, except as it may give its consent thereto. The Fleet Corporation is a private corporation of the District of Columbia, created under the laws of the United States, with power to sue and be sued in the same manner as other corporations. *Sloan Shipyards*

> *Corp.* v. *U. S. Shipping Board Emergency Fleet Corporation*, 258 U. S. 549, 568, 42 S. Ct. 386, 66 L. Ed. 762; *U. S. Shipping Board Merchant Fleet Corporation* v. *Harwood*, 281 U. S. 519, 526, 50 S. Ct. 372, 74 L. Ed. 1011. Although the United States owns its stock, it is a distinct entity just as other corporations are distinct from their stockholders. A suit against it is not a suit against the United States, and a suit against the United States is not a suit against it.

There is nothing to the contrary in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537. The fraud there was perpetrated not against a government corporation but against the government itself, the decision being that R. S. 5438 covered the case of one who knowingly caused the government to pay claims grounded in fraud. The gist of the decision is contained in the following quotation, viz:

> While payment itself, in the sense of the direct transferring of checks, was done in the name of local authorities, monthly estimates for payment were submitted by the respondents to the local sponsors on P. W. A. forms which showed the government's participation in the work and called attention to other federal statutes prohibiting fraudulent claims. It was a prerequisite to respondents' payment by the local sponsors that these estimates be filed, transmitted to, and approved by, the P. W. A. authorities. *Payment was then made from a joint construction bank account containing both federal and local funds.* The work was done under constant federal supervision.
>
> *The government's money* would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents

> thus caused *the government to pay* claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as the result of the fraudulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P. W. A. into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded. [Italics supplied.]

The fact that the government corporations here involved were not in existence at the time of the enactment of R. S. 5438 would not be controlling if the language of the section were broad enough to encompass claims against such corporations; but, as we have seen, the language is not broad enough to cover such claims, however liberal an interpretation be placed upon it. And in this connection we are bound to give consideration to the fact that the language of R. S. 3490 was not amended to cover such claims when amendments were made in the language of R. S. 5438 to cover the making of fraudulent claims against government corporations. Not only is this true, but it is true also that, in subsequent legislation passed to protect government corporations against false and fraudulent claims, criminal penalties were specifically provided but no provision was made for civil penalties or forfeitures. See 18 U. S. C. 1010 and 1014. If it were the intent of Congress that presentation of false claims against such corporations be redressed by actions for civil penalties or forfeitures, it would have been easy enough to have so provided when the stat-

utes were enacted providing the criminal penalties.* Such action by Congress would certainly be more logical and seemly than for the courts to give a forced interpretation to a statute passed three quarters of a century ago when government corporations had not been dreamed of.

Another ground for holding the statute not applicable in case No. 7224 is that the obtaining of the guaranty of loan was not the making of a claim within the meaning of the statute. *United States* v. *Tieger*, 3 Cir. 234 F. 2d 589, cert. den., 352 U. S. 941; *United States* v. *Cochran*, 5 Cir. 275 F. 2d 131, cert. den., 352 U. S. 941.

For the reasons stated, the decision in No. 7224 will be affirmed, the decision in No. 7321 will be reversed in so far as it gives judgment against defendants and affirmed in so far as it denies recovery of damages under the statute, and the decision in No. 7333 will be reversed in so far as it gives judgment against defendants.

No. 7224, *Affirmed.*

No. 7321, *Reversed in Part and Affirmed in Part.*

No. 7333, *Reversed in Part.*

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*In such case, civil penalties would properly have been made recoverable by the corporation, not by the United States. The fact that the forfeiture under R. S. 3490 must be recovered in a suit by the United States, and not by the government corporation to which the false claim has been presented, is an additional argument that false claims against such corporations are not comprehended by the statute.

No. 7224

United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

HOWARD A. MCNINCH, D/B/A THE HOME COMFORT COMPANY, ROSALIE MCNINCH AND GARIS P. ZEIGLER, APPELLEES

Judgment

Filed and Entered February 28, 1957

Appeal from the United States District Court for the Eastern District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

ALBERT V. BRYAN,
United States District Judge.

No. 7321

United States Court of Appeals for the Fourth Circuit

FREDERICK L. TOEPLEMAN, APPELLANT AND CROSS-APPELLEE

v.

UNITED STATES OF AMERICA, APPELLEE AND CROSS-APPELLANT

Judgment

Filed and Entered February 28, 1957

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed in so far as it gives judgment against defendant and affirmed in so far as it denies recovery of damages under the statute; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of North Carolina, at Raleigh, for further proceedings in accordance with the opinion of the Court filed herein.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

ALBERT V. BRYAN,
United States District Judge.

No. 7333

United States Court of Appeals for the Fourth Circuit

CATO BROS., INCORPORATED, WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE), APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Judgment

Filed and Entered February 28, 1957

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed in so far as it gives judgment against defendants; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Richmond, for further proceedings in accordance with the opinion of the Court filed herein.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

ALBERT V. BRYAN,
United States District Judge.

APPENDIX B

United States Court of Appeals for the Eighth Circuit

No. 15659

UNITED STATES OF AMERICA, APPELLANT

v.

R. S. RAINWATER, SR., SLOAN RAINWATER, JR., WILLIAM RAINWATER AS INDIVIDUALS AND AS PARTNERS, D/B/A R. S. RAINWATER & SONS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

No. 15660

UNITED STATES OF AMERICA, APPELLANT

v.

CITIZENS NATIONAL BANK, WALNUT RIDGE, ARKANSAS, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

May 3, 1957

Before WOODROUGH, VOGEL and VAN OOSTERHOUT, *Circuit Judges*

VOGEL, *Circuit Judge.*

The United States brought two separate actions under the Federal False Claims Act, §§ 3490–3492 and § 5438 of the Revised Statutes, 31 U. S. C. A.

§§ 231–233. Both actions were based on alleged false representations made to the Commodity Credit Corporation for the purpose of obtaining loans on cotton. The cases were consolidated and will be treated jointly. Subsequent to the consolidation the defendants made motions to dismiss on two grounds: 1, Lack of jurisdiction of the subject matter; 2, failure to state a claim upon which relief could be granted. Without writing an opinion setting forth its reasons, the District Court granted dismissal and the government brings these appeals.

The briefs and arguments of counsel are confined to two propositions: One, do false claims submitted to wholly owned government corporations, such as Commodity Credit Corporation, come within the purview of the False Claims Act as claims "against the Government of the United States, or any department or officer thereof"? Two, do the complaints state facts upon which relief may be granted where there has been no specific allegation of damage?

The second question requires no prolonged discussion. The complaints, after setting forth in detail the manner in which the defendants procured the "payment and allowance of false and fraudulent claims," (loans on cotton) pray for judgment "for the amounts provided for in 31 U. S. C. 231." 31 U. S. C. A. § 231, being the False Claims Act under which the actions were commenced, provides that the persons doing any of the prohibited acts "shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages." Accordingly, it cannot be said, as claimed by the defendants, that there was no allegation of damage. Certainly by inference, at least, the government asks that in addition to the sum of $2,000.00 it recover double the amount of its damages. Irrespective of that, we believe that even if

no damages were shown at the time of trial the United States could still recover the statutorily fixed sum of $2,000.00 for each of the proscribed acts. *United States* v. *Rohleder*, 1946, 3 Cir., 157 F. 2d 126, 129; *United States ex rel. Marcus* v. *Hess*, D. C. Pa., 1941, 41 F. Supp. 197, aff'd., 317 U. S. 537. We hold that defendants' second point or contention is unsound.

It is with the first proposition that difficulty arises. The False Claims Act, § 3490 of the Revised Statutes, was passed in 1863:

> SECTION 3490. Any person * * * who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundren and thirty-eight, Title "Crimes," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same ~~suit.~~

The foregoing § 3490 has never been amended, but R. S. 5438, the criminal section referred to therein, has been amended. Prior to the amendment of R. S. 5438 it, insofar as may be pertinent herein, was as follows:

> SECTION 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, *any claim upon or against the Government of the United States, or any department or officer thereof*, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposi-

> tion, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fradulent claim * * * shall be imprisoned * * *. [Emphasis supplied.]

While § 5438 was subsequently amended to include "any corporation in which the United States of America is a stockholder", it is well established that subsequent alteration or repeal of a statute previously incorporated by reference in a second statute does not affect the incorporating statute. *United States ex rel. Kessler* v. *Mercur Corp.*, 2 Cir., 1938, 83 F. 2d 178, 180:

> While section 5438 was amended, repealed, and finally since the time when it was referred to in section 3490 superseded by a broader enactment (18 U. S. C. A. § 80), it stands, so far as section 3490 is concerned, as it was written when incorporated by reference. * * * It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and "no subsequent legislation has ever been supposed to affect it." *Kendall* v. *United States*, 12 Pet. 524, 625, 9 L. Ed. 1181; *In re Heath*, 144 U. S. 92, 93, 94, 12 S. Ct. 615, 36 L. Ed. 358.

Succinctly stated, then, our question is: Do false claims submited to the Commodity Credit Corporation, a wholly owned government corporation, come within the meaning of the Federal False Claims Act as being "upon or against the Government of the United States, or any department or officer thereof"?

In a very recent case, *United States* v. *McNinch; et al.*, decided February 28, 1957, — F. 2d —, the Court of Appeals for the Fourth Circuit held that a claim against a government corporation which acts as an agency of the government is not a claim against the government of the United States or a department or officer thereof, "* * *" as required by R. S. 5438 as a condition of liability at the time of the adoption of R. S. 3490." It held that the language of the statute was not broad enough to cover such claims. The court gave consideration to the fact that the language of R. S. 3490 was not amended when amendments were made in the language of R. S. 5438 (the criminal statute) to cover the making of false claims against corporations in which the government was a stockholder. It stated, at page 11:

> If it were the intent of Congress that presentation of false claims against such corporations be redressed by actions for civil penalties or forfeitures, it would have been easy enough to have so provided when the statutes were enacted providing the criminal penalties. Such action by Congress would certainly be more logical and seemly than for the courts to give a forced interpretation to a statute passed three quarters of a century ago when government corporations had not been dreamed of.

We find ourselves in disagreement with the Fourth Circuit case and must decline to follow it. Until *United States* v. *McNinch,* no case had so held. (*United States ex rel. Salzman* v. *Salant & Salant, Inc.,* D. C. N. Y., 1938, 41 F. Supp. 196, cited by the appellees is not in point as it involves the Red Cross, whose funds are in no sense the property of the United States.) In addition to the cases reversed by *McNinch*, the District Court for the Southern District of New York, in *United States* v. *Samuel Dunkel &*

Co., Inc., D. C. N. Y., 1945, 61 F. Supp. 697, 699, in dealing with alleged frauds in connection with the sale of dried eggs to the Federal Surplus Commodities Corporation, held:

> The obvious purpose and intent of this statute (Section 231 of Title 31, U. S. C. A., R. S. § 3490 and 5438) was to reach any person who knowingly caused or assisted in causing the Government to pay claims which were grounded in fraud, without regard to whether the person had direct contractual relations with the Government, as well as those who receive money from the Government as the result of their fraud. There is not to be so strict a construction as urged by the defendants.

We rely mainly, however, upon *United States ex rel. Marcus* v. *Hess*, 1943, 317 U. S. 537 (cited in the *Samuel Dunkel* case). In doing so, we shall attempt to point out that the ultimate source of payment of the fraudulent claims was the federal treasury and when so viewed there can be no distinction between a government corporation or the government itself being defrauded. In *Marcus* v. *Hess, supra,* the Supreme Court was dealing with the same acts with which we are here concerned. There the respondents had made claims with local governmental units rather than with the United States government, but a substantial portion of their pay came from the United States for work on PWA projects. The court stated, at page 542:

> We think the conduct of these respondents comes well within the prohibition of the statute, which includes "every person who * * * causes to be presented, for payment * * * any claim upon or against the Government of the United States * * * knowing such claim to be * * * fraudulent." This can best be seen upon consideration of the exact nature of respondents' relation to the government. *The contracts*

> *found to have been induced by the respondents' frauds were made between them and local municipalities and school districts of Allegheny County, Pennsylvania. A large portion of the money paid the respondents under these contracts was federal in origin,* granted by the Federal Public Works Administrator, an official of the United States. 40 U. S. C. 401 (a). [Emphasis supplied.]

Here, *all* of the money paid defendants was "federal in origin". In fact, we do not believe it ever lost federal identity. In reversing the Circuit Court in *Marcus* v. *Hess,* the Supreme Court stated, at page 544:

> Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. While at the time of the passage of the original 1863 Act, federal aid to states consisted primarily of land grants, in subsequent years the state aid program has grown so that in 1941 approximately 10% of all federal money was distributed in this form. These funds are as much in need of protection from fraudulent claims as any other federal money and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution. The Senatorial sponsor of this bill broadly asserted that its object was to provide protection against those who would "cheat the United States." The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary.

The same is true here except instead of a "state intermediary" we have a wholly owned government corporation set up as a "bookkeeping device" for the handling of government money. After quoting portions of the statute, the Supreme Court continued:

> These provisions, considered together, indicate a purpose to reach any person who know-

ingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.

The Commodity Credit Corporation is actually an instrumentality of the United States "within the Department of Agriculture". (15 U. S. C. A. § 714) Its entire original capital of $100,000,000.00 was supplied by the United States. 15 U. S. C. A. § 714e. The Secretary of the Treasury must make an annual appraisal of the net worth of Commodity Credit Corporation and if the net worth is less than $100,000,000.00 the treasury must restore the amount of capital impairment. 15 U. S. C. A. § 713a–1. If the appraisal indicates an excess, the treasury receives such excess. 15 U. S. C. A. § 713a–2. Commodity Credit Corporation is authorized to borrow up to $14,500,000,000.00 on the credit of the United States to carry out its statutory programs of making loans on agricultural commodities. 15 U. S. C. A. § 713a–4. It seems to us, then, that both as a matter of form and as a matter of substance the alleged false claims were claims against the government of the United States and a department (Department of Agriculture) thereof. The creation of the Commodity Credit Corporation for the handling of government loans on agricultural comomdities was a "bookkeeping device" and that fact cannot cover up the substance of that with which we deal. The false claims here were against money appropriated by Congress from the Treasury of the United States, to be used in carrying out a governmental purpose. If that money were exhausted, Congress had arranged for Commodity Credit to borrow on the credit of the United States. As stafed by the Supreme Court in *Marcus* v. *Hess, supra,* "these funds are as much in need of protection from fraudulent claims as any other federal money and the statute

does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution." If the object of the statute was to protect against those who would cheat the United States, then to our minds it is applicable to the instant situation.

In *Marcus* v. *Hess, supra*, the claims were against local municipalities and school districts, but such claims were to be paid from a joint bank account containing both federal and local funds. We believe that situation to be farther removed from the strict statutory language "upon or against the Government of the United States, or any department or officer thereof" than is the situation with which we here deal—a wholly owned governmental corporation set up as a bookkeeping expediency whose *entire* funds are appropriated by the United States, whose profits, if any, go into the treasury of the United States, whose losses are reimbursed from the treasury, and whose actions are binding upon the United States to the extent of many times its capital assets.

In addition *Marcus* v. *Hess, supra*, we believe the Supreme Court's attitude toward wholly owned government corporations has been reflected in a number of other cases which indicate a tendency to disregard corporate form as a stratagem for the evasion of realities. In *Inland Waterways Corp.* v. *Young*, 1940, 309 U. S. 517, 524, the Supreme Court said:

> The true nature of these modern devices (government corporations) for carrying out governmental functions is recognized in other legal relations when realities become decisive. Compare *Clallam County* v. *United States*, 263 U. S. 341; *Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415. *The funds of these corporations are, for all practical purposes, Government funds;* the losses, if losses there be, are Government's losses. [Emphasis supplied.]

Emergency Fleet Corp. v. Western Union, 1928, 275 U. S. 415, 422, 423:

> It is argued that the government rate should be denied because the Fleet Corporation is a private corporation. In form, it is such. But all of its $50,000,000 capital stock was subscribed and paid by the Shipping Board on behalf of the United States. All has been so held by it ever since. The United States alone has had a financial interest in its capital stock. The United States alone has contributed the additional money needed from time to time for the conduct of its business.
>
> * * * * *
>
> * * * It obviously was not the intention of the Government in employing a corporate agency to deprive itself of the right of priority of transmission and of the lower rates secured through the Post Roads Act.

In *Cherry Cotton Mills v. United States*, 1946, 327 U. S. 536, 539, the Supreme Court held that in a suit against the United States the latter could counterclaim for debts owed a government corporation (Reconstruction Finance Corporation), the corporation being considered the government of the United States within the meaning of the counterclaim statute. In speaking of the Reconstruction Finance Corporation, it stated:

> Its Directors are appointed by the President and confirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; its losses the Government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes.

With equal force it can be said here of the Commodity Credit Corporation that "its Directors are appointed by the President and confirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; its losses the Government must bear" and "that the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by the Government to accomplish purely governmental purposes"—that of making loans on agricultural commodities to support the economy of the nation. We do not believe therefore that it requires a forced construction to hold that false claims filed against Commodity Credit Corporation fall withi the meaning of the Federal False Claims Act as being claims "upon or against the Government of the United States, or any department or officer thereof." We are not dealing with the criminal aspect of a statute requiring "utmost strictness" in construction. The Circuit Court in the *Marcus* v. *Hess* case, *supra,* construed this particular statute with "utmost strictness." In reversing, the Supreme Court specifically repudiated that "interpretative approach." We are dealing with a civil statute providing forfeitures for the making of false claims paid by the government. It was the fair intendment of Congress to include claims where the source of payment was the treasury of the United States. As we have seen, state intermediaries, such as local municipalities and school districts, do not constitute a bar. We cannot see how an intermediary such as a wholly owned governmental corporation could cause such false claims to escape the embrace of the statute.

These cases are reversed and remanded for trial.

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